IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 8, 2008 Session

MICHELLE BLAKELY, ET AL. v. NASHVILLE MACHINE ELEVATOR COMPANY, INC., ET AL.

Appeal from the Circuit Court for Maury County
No. 11539 Robert L. Jones, Judge

No. M2008-00070-COA-R3-CV - Filed November 25, 2008

The plaintiff, Michelle Blakely, filed this lawsuit claiming she was injured while riding an elevator owned by Saturn Corporation and maintained by Nashville Machine Elevator Company. The defendants filed a motion for summary judgment claiming that the undisputed material facts demonstrated that they were not negligent and that they did not violate any duty they may have owed to the plaintiff. The plaintiff responded to the defendants' motion by filing several depositions and the affidavit of an expert, Robert Dieter. In his affidavit, Dieter concluded, *inter alia*, that in his opinion the defendants were negligent and breached the duty of care owed to the plaintiff. The trial court nevertheless granted the motion for summary judgment after concluding there was no genuine issue of material fact. After reviewing the evidence presented by the parties, we find the plaintiff has established a genuine issue of material fact with regard to whether the defendants were negligent and breached a duty of care owed to the plaintiff. The judgment of the trial court is vacated.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, SP. J., joined.

Donald D. Zuccarello and Nina H. Parsley, Nashville, Tennessee, for the appellants, Michelle Blakely and Anthony Blakely.

J. Frank Thomas, Lynn Lawyer, and Joey Johnsen, Nashville, Tennessee, for the appellees, Nashville Machine Elevator Company, Inc., and Saturn Corporation.

OPINION

I.

This personal injury lawsuit arises out of an alleged incident which occurred while the plaintiff[1] was riding an elevator at a plant owned by the defendant Saturn Corporation. At the time of the accident, the plaintiff was employed by ACRO Service Corporation and was working at Saturn's Spring Hill plant. According to the complaint:

> On or about February 14, 2005, the Plaintiff Michelle Blakely was employed by ACRO Service Corporation, in Maury County and was on the elevator going to the second floor when the elevator door would not open and proceeded to drop at a rapid pace to the bottom floor causing the Plaintiff to suffer personal injuries.
>
> The Defendants Nashville Machine and Saturn were responsible for the proper maintenance and service of the elevator that was involved in the Plaintiff's accident.
>
> The Defendants Nashville Machine and Saturn possessed specialized training and knowledge in their responsibility to maintain a safe and proper functioning elevator.
>
> Defendants Nashville Machine and Saturn were aware that poor maintenance and service of the elevator would cause the elevator to operate and function improperly and become ultra hazardous and dangerous to occupants of the elevator.
>
> At said date and time of said accident, the Defendants Nashville Machine and Saturn were negligent in that they: (1) failed to safely maintain and service the elevator; (2) knew or should have known that said elevator was dangerous and needed additional service; (3) failed to provide warning signs and/or notice to occupants regarding the hazardous or dangerous condition of the elevator; (4) failed to properly inspect said elevator and warn others of its dangerous condition; and [(5)] failed to exercise due and reasonable care. . . .
>
> The Defendants were negligent per se in that they violated T.C.A. 68-12-101 et seq., regarding the ownership, inspection, and maintenance

[1] Michelle Blakely's husband, Anthony Blakely, was also a plaintiff. He seeks damages for loss of consortium. For ease of reference, we will refer to Michelle Blakely as the singular plaintiff. The plaintiff also sued Thyssenkrupp Elevator Manufacturing, Inc., the manufacturer of the elevator in question. The plaintiff voluntarily nonsuited Thyssenkrupp. Any reference to "the defendants" in this opinion refers only to Nashville Machine Elevator Company and Saturn Corporation.

> of said elevator and said acts were the proximate cause of the Plaintiff's injuries. . . .
>
> As a result of the Defendants' culpable acts and/or omissions as set forth herein, the Plaintiff, Michelle Blakely has incurred and will incur medical expenses, lost wages, loss of earning capacity, pain and suffering, loss of enjoyment of life, emotional distress, and permanent damages for all of which she deserves to be compensated.

(Original paragraph numbering omitted).

The defendants answered the complaint and denied any liability to the plaintiff. The defendants then filed a joint motion for summary judgment claiming that the undisputed material facts demonstrate that they are entitled to judgment as a matter of law. In support of their motion, defendants primarily relied on the deposition testimony of Thomas Jackson, an elevator technician who has been employed by Nashville Machine for almost 35 years. Jackson testified that he performs the state-required tests on the elevators at the Saturn plant, including the elevator where the plaintiff allegedly was injured. Jackson added that he performs visual inspections and checks the parts and bearings every month for each elevator at the plant. In short, Jackson testified that what happened on the day of the alleged accident was that the plaintiff was in the elevator when the elevator went through a safe "resynching" process, which the elevator was designed to do when jacks on the elevator are not in alignment. According to Jackson's deposition:

> Q. If you would just tell me what you can gather from the paperwork and your recollection of the phone call you received February 15th of [2005].
>
> A. The call was the elevator was shut down. Upon arrival on the job I found the elevator in operation. I inspected the elevator. It says here that I found a FAST error. FAST stands for Field Adjusting Service Tool. It's a small service tool computer type deal. I can plug it in, type in codes and it will tell me if it's had any errors and what errors those were. It says it had an Error 66, which is a resynch fault. I inspected the jacks, rode the elevator, couldn't find anything else wrong, checked "okay." Couldn't find anything wrong and left it in service.
>
> Q. What does the resynch fault mean?
>
> A. This elevator has twin telescopic jacks that actually push the elevator up. These telescopic jacks have to stay in synchronization. There are sensors in the hatch. There's one at each floor called a static sensor. And at the top floor, below the first – the top floor

landing there's a dynamic sensor. If this elevator is sitting floor level these sensors have to be activated. That shows that the jacks are where they're supposed to be – the plungers are where they're supposed to be, excuse me. So if it's at the first floor I have to be sitting on the sensors. If it's at the second floor I have to be sitting on the sensors. If the elevator is running up at fast speed, which is contract speed – I'm calling it fast speed, contract speed – it has to pass the dynamic sensor. They have to pass equally, otherwise it says "Okay, one jack is out from the other." And that's what – That's what the resynch is. That's keeping the jacks to where they're the same all the time.

Q. Does it self correct?

A. Yes.

* * *

Q. [I]f the jacks are not in sequence will it drop to the pit buffers?

A. It will not drop. If this elevator is in motion and it's running up, one, we have what we call plunger caps. These plunger caps are on each jack. These plunger caps are what activate the sensors. Let's say one cap is higher than the other one. It throws a flag into the system. The elevator will stop. Which is a hydraulic stop, normal stop. It will – Instead of going up it's going to reverse directions and go down at contract speed.

It will go to the bottom floor, stop. It will lower into the pit on the leveling speed. It will sit on those buffer springs . . . [and] take all the pressure off the system, let the plungers drop down. Then when – It distributes the oil equally is what it does. That's what we call resynching.

It's basically just getting the oil redistributed where it's supposed to be so that each of these caps lines up with the other one as it runs back up. After approximately sixty to ninety seconds of time the system will energize and it will raise back up to floor level.

* * *

I think what happened [on the day in question] is that the elevator sensed it was out of synch. It went into resynch mode, which is what

I explained earlier. The elevator stopped, it went back down, lowered into the pit, synchronized itself and then came back up. That's one scenario.

The other scenario is this thing will try to resynch four times in ten minutes. . . . On the fourth time it will take itself out of service. It may have easily – She stepped on the elevator, it started back up. That was the third time it went to resynch and it went back down and shut itself off.

I really – The second scenario, I don't really go with that because the elevator was running when I got there. But that is a possibility. I think it did a normal resynch just what it was designed to do.

* * *

[A few months later,] . . . in May I met with the service repair crew and he came in and changed an internal jack seal. . . . This is about a day long job to replace an internal seal and they don't tie me up that long.

Q. Do you know why the jack seal had to be replaced on the L850?

A. Apparently there was a – It was just a little drip down every once in a while so they – For a check valve – There's a check valve and an internal seal and, if we get any drift, and visible change, then we come in and replace it all.

Q. After the 14th of February, [2005] did you ever find that there was a leak or a hydraulic leak in the L850?

A. It shows on May of [2005] that we replaced one of the seals.

In response to the defendants' motion for summary judgment, the plaintiff filed her own deposition. As relevant to this appeal, the plaintiff testified:

Q. Ms. Blakely, can you tell me what happened on February 14th of 2005 that led you to file this Complaint? Just tell me what happened in the elevator.

A. I left – I was leaving work for the day. I got on the elevator in the building that I work in and took the elevator to the second

floor, where the parking lot is. The elevator went to the second floor, dropped back down to the first floor. Instead of the door opening, the elevator dropped back down. And then I had to press the button several times to get the door to open on the first floor.

Q. How long were you in the elevator total from when you walked in and you said it went up and then you were able to get back out?

A. Not very long. I don't think I really paid any attention to the timing.

* * *

Q. And you say it fell back to the first floor. Are you saying that because you felt it fall back to the first floor or because you just assumed it fell back to the first floor?

A. I felt it.

Q. What exactly did you feel?

A. I felt the elevator dropping down.

Q. How fast? Was it a quick drop, or was it a slow drop?

A. It was a rapid drop.

Q. Did you get off the elevator on the first floor, then?

A. It was just below. It was . . . just below the first floor. . . .

Q. Was there a loud pop or a loud noise or anything like that?

A. It made a noise when it dropped. . . . I heard the noise after the elevator dropped, the elevator touching base . . . .

Q. What happened immediately after you exited the elevator? Who did you talk to, or did you just take the stairs up to leave from work?

A. I looked around to see if anyone was around. No one was around. I took the stairs and left. . . .

Q. When was the first time you mentioned this incident to anyone at the Saturn plant?

A. The next morning, I called it in.

* * *

Q. Ms. Blakely, when was the first time you had any pain or injury from this incident?

A. I felt discomfort that night.

Q. Can you describe the discomfort?

A. Stiff achiness.

Q. Where?

A. In my neck.

The plaintiff also filed the deposition of L.J. Johnson, who has worked for General Motors for 36 years and is presently working at the Saturn facility in Spring Hill. Johnson was the facilities engineer for power train in 2005. As facilities engineer, Johnson contacts the various companies that General Motors uses for maintenance at the facility. Since Johnson has been the facilities engineer, he has only dealt with Nashville Machine for maintenance of the elevators. Johnson stated that one day at work the plaintiff approached him:

> And she stopped me and said that she had a problem with the elevator, that the elevator had stopped, it had jerked, it had dropped, and she was afraid of it, she wasn't going to ride it again, and asked me if I would do something about it for the most part. . . .
>
> Immediately I called another individual who in turn gets a hold of Nashville Machine and they came out. I wasn't there when they came out, but I just got the report of what they found. Initially they said they didn't find anything.
>
> What I later found out was that – if I remember this correctly, plant security came to the elevator when the young lady was in the elevator. They came to the elevator and somehow got the doors open. My understanding, the process of doing that, they probably inadvertently erased some information that's stored in the elevator's computer, for lack of a better term, and some information was lost.

I am aware that this thing happened again. I don't think it was the same – It was not the same person. It was another young lady. She described the same thing. The elevator came down and it dropped, shook if you will. And this time my understanding was that the information was saved whereas Nashville Machine could extract information out of the machine and try to figure out what the problem was.

And what I remember hearing was that it either was – the hydraulics were out of adjustment, and I think they ended up changing the belts between the drive motor and the hydraulic pump.

* * *

Q. Do you recall or did you ever call . . . Ms Blakely, and leave her a message, informing her of what the problem was with the elevator?

A. I recall stopping – either stopping by, seeing her in the office or in the aisle to give her a follow up on what – my understanding of what they found. If I'm – I recall that they said they couldn't duplicate the problem. He went down and did a maintenance check. He was guessing at what to look at and so forth and so on. . . . [H]e couldn't duplicate the problem.

Q. Do you recall or did you ever call her and tell her that they found the problem, that there was an hydraulic leak in the elevator?

A. No. He told me that he checked the hydraulics and he changed the belts and he ran the elevator up and down and couldn't duplicate the problem. . . .

Q. Is it your understanding that they actually did eventually diagnose the problem and fix it?

A. My understanding is that after the second lady had the same issue we got a little bit more involved and asked a little bit more pointed questions. The maintenance guy suggested, well, you know, if the thing is out of balance, if it's off kilter it has a fault mode it goes into whereas it will stop. And I guess it will stop and it would gather its thoughts together and then go to a default position.

The plaintiff also filed the affidavit of Robert Dieter, the vice-president of Dieter Consulting Services, a company which provides consulting services to the elevator industry. Among other things, Dieter reviewed the incident report, inspection logs, photographs, the system dispatch reports, and the depositions of the plaintiff and Johnson. According to Dieter:

> Elevator L850, located at the General Motors plant in Maury County, Tennessee, was serviced and maintained by Nashville Machine Elevator Company on or about February 14th, 2005 and the years preceding February 14th, 2005. Nashville Machine Elevator Company is also responsible for obtaining and maintaining the required state licenses for the elevators, including the L850, at the General Motors plant in Maury County, Tennessee. However, on or about February, 2005, General Motors - also known as Saturn Corporation, - was the owner of the elevators at the plant location in Maury County, Tennessee, including the L850.
>
> Both Nashville Machine Elevator Company and General Motors failed to safely maintain and service the L850 elevator. The number of tickets generated for the L850 elevator establishes that the L850 had numerous problems. The numerous problems experienced and reported for the L850 go beyond reasonable reliability for an elevator in 2005. The lack of reasonable reliability in the L850 created a hazardous and dangerous condition for the elevator's occupants on or about February, 2005.
>
> Nashville Machine Company and General Motors used a system of communication regarding service and maintenance requests for the L850 which made both companies aware of the numerous problems the L850 elevator was experiencing prior to February 14th, 2005. This system of communication ensured that both Nashville Machine Company and General Motors knew or should have known that the L850 was unreliable, dangerous and in need of further maintenance and service attention.
>
> Despite both Nashville Machine Company and General Motors [sic] knowledge of the numerous problems and dangers associated with L850, the deposition testimony of Thomas Jackson, L.J. Johnson and Ms. Blakely establishes that neither company warned potential occupants or gave notice to potential occupants of the dangerous condition and unreliability of this elevator.
>
> The employees and staff of Nashville Machine Company and General Motors failed to properly inspect and maintain the L850. Due to the

> lack of proper testing, maintenance and inspection of the L850 the L850 was not functioning as the manufacturer intended nor as the occupants reasonably expected on or about February 14th, 2005.
>
> On or about February 14th, 2005, the L850 was functioning improperly, which caused the elevator to return to the lower floor and stop abruptly while Ms. Blakely was an occupant.
>
> The employees and staff of Nashville Machine Company and General Motors failed to exercise due and reasonable care in the service and maintenance of the L850 elevator on or about February, 2005. The numerous problems discovered before February 14th, 2005 either notified or should have notified both companies that the L850's function had progressed beyond reasonable reliability - which creates a dangerous situation for occupants. Both companies' failure to take service and maintenance measures, including testing beyond visual inspection for hydraulic leaks, constitutes a failure to exercise due care. More [thorough] testing of the L850, completed after Ms. Blakely's incident in February, 2005, revealed a drip within an internal jack seal, which lead to the internal jack seal replacement in May of 2005. More diligent preventative measures, maintenance and service calls could have revealed the mechanical problems within the L850 and eliminated the dangerous condition. The numerous problems noted prior to February 14th, 2005 should have prompted both companies to complete more diligent precautions, maintenance and service of the L850 elevator.
>
> I, Robert F. Dieter, further opine to a reasonable degree of professional certainty that more diligent attention to the L850 elevator more probably than not would have prevented the improper functioning which occurred on February 14th, 2005, which caused the elevator to return to the lower floor and stop abruptly while Ms. Blakely was an occupant.

(Original paragraph numbering omitted).

Following a hearing on the defendants' joint motion for summary judgment, the trial court entered an order granting the motion. The order entered by the trial court states as follows:

> This court heard oral arguments of counsel for the defendants and the [plaintiff] on October 26, 2007, and took under advisement the defendants' motion for summary judgment so the court could more thoroughly consider the depositions, affidavits, and legal authorities

> relied upon by the parties in seeking and opposing summary judgment.
>
> After a full review of the record, the court concludes that the undisputed facts and reasonable inferences from those facts establish that the [plaintiff] cannot show that the elevator owned and maintained by the defendants malfunctioned in any manner on February 14, 2005, so as to constitute a breach of any duty owed to the [plaintiff]. Since the [plaintiff is] unable to establish that necessary element of a negligence action, [her] cause of action must fail, and summary judgment for the defendants is appropriate.

II.

The plaintiff appeals claiming that the trial court erred when it granted the defendants' motion for summary judgment because, according to the plaintiff, there are disputed issues of material fact. The defendants argue that the trial court correctly granted their motion.[2] The defendants also claim that the trial court correctly ruled that the affidavit of Robert Dieter should be excluded pursuant to Rules 702 and 703 of the Tennessee Rules of Evidence.

III.

In a very recent Supreme Court opinion, the High Court granted permission to appeal in order "to provide further guidance regarding the application of summary judgment in this State." ***Martin v. Norfolk Southern Railway, Co.***, ___ S.W.3d ___, 2008 WL 4890252 (Tenn., filed November 14, 2008).[3] The Court opined as follows:

---

[2] The defendants' motion for summary judgment was premised on two theories. First, the defendants argued that the elevator at all times was working properly and none of the defendants were negligent or otherwise violated any duty owed to the plaintiff. The proof supporting and opposing this basis for summary judgment is set forth at length above. The second component of the motion was a claim that the undisputed material facts demonstrate that the injuries of which the plaintiff complained are not causally related to the elevator incident. As to this basis for summary judgment, the trial court determined that there was a genuine issue of material fact, stating in its final judgment:

> The court doubts that the [plaintiff] would be able to carry [her] burden of establishing that [her] damages were factually and proximately caused by any malfunction of the subject elevator, but there is sufficient dispute of material facts so that the court must deny summary judgment on causation issues.

On appeal, the defendants do not set forth a separate issue challenging this latter ruling by the trial court. Accordingly, we have not discussed the proof offered by the parties pertaining to causation of the plaintiff's claimed injury.

[3] Due to the fact that ***Martin*** was filed so recently, the citation to the official South Western reporter currently is not available. The same is true for the ***Hannan*** opinion cited in ***Martin***. The Westlaw citation to the ***Hannan*** opinion is: ***Hannan v. Alltel Pub. Co.***, ___ S.W.3d ___, 2008 WL 4755788 (Tenn., filed October 31, 2008).

The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, ___ S.W.3d ___, ___ (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, ___ S.W.3d at ___. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

> If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:
>
> > (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.
>
> *McCarley*, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id*.
>
> Because the resolution of a motion for summary judgment is a matter of law, we review the trial court's judgment de novo with no presumption of correctness. *Blair*, 130 S.W.3d at 763. In addition, we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party. *Staples*, 15 S.W.3d at 89.

Martin v. Norfolk Southern Railway, Co., ___ S.W.3d ___, 2008 WL 4890252 (Tenn., filed November 14, 2008).

As to the defendants' evidentiary issue, "[q]uestions involving the qualifications, admissibility, relevancy, and competency of expert testimony are matters left within the broad discretion of the trial court." ***State v. Stevens***, 78 S.W.3d 817, 832 (Tenn. 2002). Accordingly, we will not overturn a trial court's ruling absent a finding that the trial court abused its discretion in ruling on the admissibility of the expert's testimony. ***State v. Ballard***, 855 S.W.2d 557, 562 (Tenn. 1993). A court abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shuck***, 953 S.W.2d 662, 669 (Tenn. 1997).

IV.

We first will address the defendants' evidentiary issue because, if the affidavit of Robert Dieter was, in fact, excluded and was properly excluded, then the absence of that affidavit could impact the bigger issue, *i.e.*, whether there is a genuine issue of material fact regarding whether the defendants were negligent or otherwise breached a duty owed to the plaintiff.

In their brief on appeal, the defendants correctly point out on several occasions the high deference this Court must give to the trial court's evidentiary rulings. According to the defendants' brief:

> *[U]pon appellate review, the trial court's decision concerning the admissibility of expert testimony "may only be overturned if the discretion is arbitrarily exercised or abused." Stevens*, 73 S.W.3d at 264.

(Emphasis in the original.)

The primary problem with the defendants' evidentiary argument is that the record does not reflect that the trial court *actually* excluded the affidavit of Mr. Dieter. In their reply to the plaintiff's response to the defendants' motion for summary judgment, the defendants did argue that the affidavit should be excluded. However, the admissibility of Dieter's affidavit was barely mentioned at oral argument on the defendants' motion, and the trial court's final judgment granting that motion makes absolutely no mention at all of the affidavit. We think if the trial court actually excluded consideration of such a key piece of evidence when ruling on the motion, the final judgment would so reflect and explain why the affidavit was excluded.

Having determined that the affidavit of Dieter was not excluded by the trial court, the issue then becomes whether the trial court should have excluded that affidavit. Again quoting from the defendants' brief, we must keep in mind that the trial court's decision *"'may only be overturned if the discretion is arbitrarily exercised or abused.' Stevens*, 73 S.W.3d at 264." (Emphasis in original.)

Tenn. R. Evid. 702 provides that:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 703 provided that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

The defendants' primary argument is that the Dieter affidavit was not specific enough, *i.e.*, was based on speculation, and failed to identify a specific problem with the elevator.[4] In his affidavit, Dieter identified the various and numerous documents he reviewed prior to rendering his opinion, including inspection logs, incident reports, system dispatch reports, depositions, etc. Among other things, Dieter concluded that there was an abnormally high number of tickets generated for the L850 elevator which made that elevator unsafe. This unsafe condition, according to Dieter, "caused the elevator to return to the lower floor and stop abruptly while Ms. Blakely was an occupant." We think the plaintiff demonstrated that Dieter had specialized knowledge and the contents of Dieter's affidavit certainly could "substantially assist the trier of fact . . . to determine a fact is issue." Tenn. R. Evid. 702.

All of the defendants' challenges to Dieter's affidavit go to the weight to be given his testimony. These challenges, however, by no means rise to the level of untrustworthiness. The issue before this Court is not whether Dieter's affidavit is "bullet-proof." Rather, we must decide whether the trial court *abused its discretion* when it failed to exclude that evidence. Considering the record as a whole, we conclude that it did not. *See* ***GSB Contractors, Inc. v. Hess***, 179 S.W.3d 535, 546 (Tenn. Ct. App. 2005) wherein we concluded:

> After reviewing the record, we cannot say that the trial court abused its discretion in finding that Mr. Merritt qualified as an expert and in admitting his testimony. All of the discrepancies raised by GSB on appeal go the credibility of Mr. Merritt's opinions. As such, we give great deference to a trial court's determinations regarding witness credibility when reviewing a case on appeal. *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991).

Having determined that the trial court did not abuse its discretion when it failed to exclude Dieter's affidavit, we conclude that this affidavit must be considered when evaluating whether there was a genuine issue of material fact precluding summary judgment. As set forth previously, when undertaking this analysis we must accept the plaintiff's evidence as true and draw all reasonable inferences in her favor. We also must resolve any doubts concerning the existence of a genuine issue of material fact in favor of the plaintiff. *See* ***Martin****, supra*. When considering the proof offered by the plaintiff, including particularly the Dieter affidavit, we quickly and easily conclude that there are

[4] The defendants do not challenge Dieter's qualifications to testify as an expert.

genuine issues of material fact bearing upon the issue of whether the defendants were negligent and, therefore, breached a duty to the plaintiff. We simply hold that based upon the evidence now before us that is favorable to the plaintiff's position, a jury could reasonably conclude that the defendants were negligent. Accordingly, the trial court erred when it granted the defendants summary judgment.

V.

The judgment of the trial court is vacated and this case is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are taxed to the appellees, Nashville Machine Elevator Company, Inc., and Saturn Corporation, for which execution may issue.

_____
CHARLES D. SUSANO, JR., JUDGE